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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 610

LYLE T. SOULE,
Petitioner,
vs.
MILDRED SOULE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the
State of California

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Subject Index

	Page
Official reports of decisions below	1
Jurisdiction of this court	2
Questions presented for review	3
Constitutional provisions and statutes involved	3
Statement of the case	6
The decision of the California courts in the interpretation of Section 417(c) of the California Code of Civil Procedure, is contrary to the 14th Amendment to the Constitution of the United States	8
Conclusion	10

Table of Authorities Cited

Cases

	Page
Pennoyer v. Neff (1878), 95 U.S. 714, 24 L.Ed. 565	8

Constitutions

Constitution of the United States, 14th Amendment	3

Statutes

Code of Civil Procedure:	
Section 412	4
Section 413	4
Section 417	5
28 U.S. Code, Section 1257(1), Act of June 25, 1948, C. 646, 62 Stat. 929	2

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Comes now your petitioner, Lyle T. Soule, appearing specially to Vacate Portions of Decree of Divorce and Appeal thereon, and respectfully petitions that a Writ of Certiorari issue from this Court to the Supreme Court of the State of California to review the judgment rendered in the above-entitled case.

OFFICIAL REPORTS OF DECISIONS BELOW

The judgment of the Honorable, The District Court of Appeal of the State of California, Third Appellate

District, is officially reported at 193 A.C.A. 495, 14 Cal. Rep. 417. That judgment is appended. The Supreme Court of the State of California denied a Petition for Hearing, without opinion.

JURISDICTION OF THIS COURT

Judgment of the Honorable, The District Court of Appeal of the State of California, Third Appellate District, was entered on the 28th day of June, 1961. Supreme Court of the State of California denied a hearing thereon on the 23rd day of August, 1961.

There has been no petition for rehearing. The case presents only questions of law.

Jurisdiction of this Court is conferred by Title 28, Section 1257 (1) U.S. Code, Act of June 25, 1948, C 646, 62 Stat. 929, which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ". . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

QUESTIONS PRESENTED FOR REVIEW

The said District Court of Appeal, Third Appellate District held:

A California divorce court acquired jurisdiction to render a personal judgment against a husband, where the action was commenced after the husband had left the State of California, and service was by publication completed by personal service on the husband in Montana, IF THE HUSBAND WAS DOMICILED IN CALIFORNIA WHEN THE CAUSE OF ACTION AROSE, THAT IS, *WHEN THE ACTS OF CRUELTY WERE COMMITTED.* THE RENDERING OF THE PERSONAL JUDGMENT AGAINST THE HUSBAND DID NOT DEPRIVE THE HUSBAND OF DUE PROCESS UNDER THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION.

THE ISSUE: Did the trial Court have jurisdiction to render a personal judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The 14th Amendment to the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Section 412 of the Code of Civil Procedure of the State of California provides as follows:

"Where the person on whom service is to be made resides out of the State; or has departed from the State; or can not, after due diligence, be found within the State; or conceals himself to avoid the service of summons; or is a corporation having no officer or other person upon whom summons may be served, who, after due diligence, can be found within the State, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit, or by the complaint on file, that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant or corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or corporation from any interest therein, such court, or judge, may make an order that the service be made by the publication of the summons."

3. Section 413 of the Code of Civil Procedure of the State of California provides as follows:

"The order must direct the publication to be made in a newspaper, to be named and designated

as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once each calendar week; but publication against a defendant residing out of the State, or absent therefrom, must be pursuant to Section 6065 of the Government Code, except in proceedings instituted pursuant to the provisions of Chapter 4, Title 3, Part 3, this code. In case of publication, where the residence of a nonresident or absent defendant is known, the court, judge, or justice, must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post office. Service is complete upon the making of such personal service or at the expiration of the time prescribed by the order for publication, whichever event shall first occur.

"As used in this section 'post office' includes mail box, sub-post office, substation and mail chute or other like facility regularly maintained by the Government of the United States."

4. Section 417 of the Code of Civil Procedure of the State of California provides as follows:

"Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this

State at the time of the commencement of the action or at the time of service."

STATEMENT OF THE CASE

This case presents only questions of law.

No facts were required to be determined in this case, which was based solely on the record, documents filed in the trial Court in which judgment was rendered on an uncontested basis.

We adopt the statement of the facts by the District Court of Appeal, Third District of the State of California, as follows: (The defendant in the lower Court is the Petitioner here.)

> "On July 2, 1959, plaintiff commenced an action against defendant for a divorce, charging extreme cruelty and asking that defendant be ordered to pay community debts, alimony and plaintiff's attorney's fees and court costs. The cause of action arose in California at a time when both parties were residents of this state, but before the action was commenced defendant moved to Montana to reside. In September, 1959, plaintiff secured an order for publication of summons, pursuant to Code of Civil Procedure, §412, and defendant was personally served with summons in Montana on September 28, 1959 (see Code of Civil Procedure, § 413). Defendant having failed to appear, answer or demur within the time allowed by law, his default was entered on December 14, 1959. Thereafter, plaintiff was granted an interlocutory decree of divorce on the ground of extreme cruelty, and the defendant was ordered to pay

plaintiff $300 per month beginning January 1, 1960, for a period of nine months, subject to the further order of the court, and to pay plaintiff's attorney's fees and court costs. The decree also awarded plaintiff the equity in certain real property together with certain personal property. On June 21, 1960, appellant appeared specially and unsuccessfully moved to vacate and delete from the interlocutory decree all the provisions thereof, except insofar as it was decreed that plaintiff is entitled to a divorce. He does not question the jurisdiction of the court to dissolve the marriage of the parties.

"Section 417 of the Code of Civil Procedure, as amended in 1957, provides: 'Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State (a) at the time of the commencement of the action, or (b) at the time that the cause of action arose, or (c) at the time of service.'

"Since the defendant was residing in Montana at the time the action was commenced and at the time of service, jurisdiction under section 417 of the Code of Civil Procedure must be based upon his residence here at the time the cause arose (subd. (b))."

THE DECISION OF THE CALIFORNIA COURTS IN THE INTERPRETATION OF SECTION 417 (c) OF THE CALIFORNIA CODE OF CIVIL PROCEDURE, IS CONTRARY TO THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The basic case in this field of personal jurisdiction is the case of *Pennoyer v. Neff* (1878), 95 U.S. 714, 727, 24 L.Ed. 565, 570. Mr. Justice Field, the great California jurist, said:

> "Substituted services by publication, *or in any other authorized form,* may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners; or, when the public is a party, to condemn or appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another

> State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability." (Emphasis supplied.)

While this case has been modified in the direction of an enlargement of the concept of jurisdiction so that

> "The Court may acquire jurisdiction over the non-resident if there are such minimal contacts by the non-resident with the State so as to make it reasonable that he should be amenable to suit within the State." 1960 Pocket Part, C.J.S. Courts Section 76, pages 111-114, near bottom of last column.

But, we submit, that no case in the field of divorce allows such an in personam judgment as rendered here, based only on personal service on a non-resident out of the State rendering the judgment. We also submit, that the accident and tort cases should not apply in this field. The Honorable Court is well aware of the many vexing problems of jurisdiction with reference to divorce, as among the several States, and, we respectfully submit, that sustaining this decision we only add to the difficulties.

We pose a future, but logical complication:

In this case, the Courts of Montana had granted the husband a divorce on September 17, 1959 (before

the California decree), based on complaint filed in May, 1959 (before the California filing). The defendant still resides in Montana, and the California decree must necessarily be enforced in Montana. Must the Montana Courts give effect to the in personam portions of the California decree?

CONCLUSION

We respectfully submit that the Petition for Writ of Certiorari should be granted.

Dated, Sacramento, California,
November 16, 1961.

A. M. Mull, Jr.,
Cecil J. Bishop,
Attorneys for Lyle T. Soule, Petitioner, appearing specially, for the purpose of Motion to Vacate Portions of Interlocutory Decree of Divorce and Appeal Therefrom.

(Appendix Follows.)

Appendix

(Vol. 193 A.C.A. 495)

In the District Court of Appeal
State of California
Third Appellate District

3 Civil No. 10,160

MILDRED SOULE,
Plaintiff and Respondent,
vs.
LYLE T. SOULE,
Defendant and Appellant.

OPINION

On July 2, 1959, plaintiff commenced an action against defendant for a divorce, charging extreme cruelty and asking that defendant be ordered to pay community debts, alimony and plaintiff's attorney's fees and court costs. The cause of action arose in California at a time when both parties were residents of this state, but before the action was commenced defendant moved to Montana to reside. In September, 1959, plaintiff secured an order for publication of summons, pursuant to Code of Civil Procedure, section 412, and defendant was personally served with summons in Montana on September 28, 1959 (see

Code of Civil Procedure, section 413). Defendant having failed to appear, answer or demur within the time allowed by law, his default was entered on December 14, 1959. Thereafter, plaintiff was granted an interlocutory decree of divorce on the ground of extreme cruelty, and the defendant was ordered to pay plaintiff $300 per month beginning January 1, 1960, for a period of nine months, subject to the further order of the court, and to pay plaintiff's attorney's fees and court costs. The decree also awarded plaintiff the equity in certain real property together with certain personal property. On June 21, 1960, appellant appeared specially and unsuccessfully moved to vacate and delete from the interlocutory decree all the provisions thereof, except insofar as it was decreed that plaintiff is entitled to a divorce. He does not question the jurisdiction of the court to dissolve the marriage of the parties.

Section 417 of the Code of Civil Procedure, as amended in 1957, provides: "Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State (a) at the time of the commencement of the action, or (b) at the time that the cause of action arose, or (c) at the time of service."

Since the defendant was residing in Montana at the time the action was commenced and at the time of

service, jurisdiction under section 417 of the Code of Civil Procedure must be based upon his residence here at the time the cause arose (subd. (b)).

"As used in section 417, resident means domiciliary." (Owens v. Superior Court, 52 Cal. 2d 822, 827, citing Smith v. Smith, 45 Cal. 2d 235, 240). In the instant case, defendant was a California domiciliary at the time the cause of action arose. Defendant contends, however, that this fact was not sufficient to permit the state to acquire jurisdiction over him by personal service outside its borders, although he concedes that the California court had jurisdiction over the "matrimonium," i.e., the *res* of the marriage. He argues that at the time the action was brought and thereafter at the time service was made, he was domiciled in Montana, and that under the due process clause of the fourteenth amendment to the Constitution of the United States, in personam jurisdiction must be based upon such facts or upon consent.

A similar contention was made in Owens v. Superior Court, *supra*. There plaintiff (the real party in interest) "commenced an action against the defendant . . . to recover damages for injuries suffered from being bitten by defendant's dog. The cause of action arose in California when defendant was a resident here, but before the action was commenced, defendant became a permanent resident of Arizona. . . . [P]laintiff secured an order for publication of summons pursuant to Code of Civil Procedure, section 412, and defendant was personally served with summons in Arizona. . . . Defendant appeared specially

and moved to quash the service of summons on the ground that it was ineffective to give the trial court jurisdiction over him. The [trial] court denied the motion, and he then filed this petition for a writ of prohibition to prevent further proceedings against him." (p. 826.) A peremptory writ was denied. In reference to tortious acts within this state, the court said at page 832:

"It [the legislature] has provided, . . . that our courts shall have personal jurisdiction pursuant to sections 412 and 413 of the Code of Civil Procedure to the extent constitutionally permissible if the conditions of section 417 are met. The conditions of section 417 have been met in this case, and the fact that the cause of action arose out of defendant's activities here fully justifies the assumption of jurisdiction over him by personal service outside the state.

"Even if we were to assume that an activity carried on within the state out of which the cause of action arose must be of some peculiarly dangerous or serious kind to justify an assertion of jurisdiction, no such limitation exists if the defendant was also domiciled in the state at the time the cause of action arose. When, as in this case, the cause of action arose here out of an activity carried on here at a time when defendant was domiciled here, 'the quality and the nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure' (International Shoe Co. v. Washington, 326 U.S. 310, 319 [66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057]) fully justifies

subjecting defendant to the jurisdiction of our courts. (Henry R. Jahn & Son v. Superior Court, 49 Cal. 2d 855, 862 [323 P. 2d 437]; Carl F. W. Borgward, G.M.B.H. v. Superior Court, 51 Cal. 2d 72, 79 [330 P. 2d 789].)"

By analogy, what was said in the *Owens* case applies equally to this case. There it was held that section 417, subdivision (b), did not violate the requirements of the due process clause of the federal Constitution. Appellant's arguments and contentions are fully disposed of by the opinion in that case and need not be repeated here.

The order denying the motion to vacate portions of the interlocutory decree is affirmed.

Warne, J. pro tem.

We concur:

Van Dyke, P. J.,

Peek, J.

Filed, June 28, 1961.

L. A. Fudres, Clerk.

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IN THE

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OCTOBER TERM, 1961

No. 610

LYLE T. SOULE
Petitioner

vs.

MILDRED SOULE
Respondent

RESPONDENT'S REPLY BRIEF
TO PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the
State of California

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TOPICAL INDEX

JURISDICTION OF THIS COURT 1

QUESTIONS FOR REVIEW 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

SECTION 417(c) OF THE CALIFORNIA CODE OF CIVIL PROCEDURES IS NOT CONTRARY TO THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES 2

CONCLUSION 5

CASES

McGee v. International Life Ins. Co., 355 U.S. 220 3

Milliken v. Meyer, 311 U.S. 457 3

Owens v. Superior Court, 52 Cal. 2 822 4

Pennoyer v. Neff, (1878), 95 U.S. 714, 727, 24 L Ed 565, 570 2

CODES

California Code of Civil Procedures 417(c) 5

IN THE

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OCTOBER TERM, 1961

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LYLE T. SOULE

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vs.

MILDRED SOULE

Respondent

RESPONDENT'S REPLY BRIEF
TO PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the
State of California

Comes now respondent, Mildred Soule, and replies to petitioner's Petition for a Writ of Certiorari, and prays that said petition should be denied.

JURISDICTION OF THIS COURT

Jurisdiction of this Court for the purposes of these proceedings is conceded by respondent.

QUESTIONS FOR REVIEW

It is further conceded by the respondent that the bare issue before this Court is as stated in the petition, that is: "Did the trial Court have jurisdiction to render a personal judgment?"

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The respondent will adopt the Constitutional Provision and Statutes cited by petitioner as those applicable in this case.

The case is as stated in the petition.

SECTION 417 (c) OF THE CALIFORNIA CODE OF CIVIL PROCEDURE IS NOT CONTRARY TO THE 14th AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

Petitioner cites only one case in support of his position. This case is Pennoyer v. Neff, (1878), 95 U. S. 714, 727, 24 L. Ed. 565, 570, which was decided in 1878 and quotes from that

decision. It need not be stated that this case has been distinguished and modified to such an extent that it only controls where a defendant served with process outside of the State had never been in the State, or had any contact whatsoever with the plaintiff within the State.

The holding in the Pennoyer case was broadened most significantly by the historic case of Milliken v. Meyer, 311 U.S. 457, which held that an "incident of domicile within the State's amenability to suit within the State even during sojourns without the State, where the State has provided and employed a reasonable method for apprising such an absent party of the proceedings against him." In the present case personal service was made on the defendant in Montana under the provisions of the California Code of Civil Procedure.

In McGee v. International Life Ins. Co., 355 U.S. 220, it was held that "in some circum-

stances there is adequate basis for jurisdiction when the defendant has elected to deal with the plaintiff even though only by mail."

Petitioner suggests that the instant case should be distinguished from motor vehicle cases. In this regard, this court stated in Olberding v. Illinois Central R. Co., 346 U.S. 338, "It is now settled that jurisdiction over non-resident motorists does not rest on consent but on their activity in the State." (emphasis ours).

It would appear from a reading of the petition that petitioner concedes that an in personam judgment as rendered here would be proper in a tort case (Page 9, Para. 3). The California Court in Owens v. Superior Court, 52 Cal 2,822, has decided this very point citing the authorities cited herein and many others construing the statutes in question.

Petitioner contends that the law regarding in personam judgment in tort cases should not

apply in divorce cases because of the vexing problems of jurisdiction which, he claims, exist in divorce cases.

We submit that this contention is patently invalid. We submit that the contractual obligations incurred in and continuing during matrimony are equal to or superior to those of other contracts and that the acts of one party toward the other while domiciled or resident in the State confer jurisdiction on the Courts of this state to render an in personam judgment where there has been proper service of process.

CONCLUSION

It is respectfully submitted that the provisions of Section 417(c) of the California Code of Civil Procedure do not violate the provisions of the 14th Amendment of the Constitution of the United States, and that the Petition for Writ of Certiorari should be denied.

DATED at Sacramento, California,

this 3rd day of January 1962.

DAVID G. McINNES
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THOMAS A. WAHL

By Thomas A. Wahl

Attorneys for MILDRED SOULE,
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